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IN THE

Supreme Court of the United States

HOUSEHOLD CREDIT SERVICES, INC.
and MBNA AMERICA BANK, N.A.,

Petitioners,

v.

SHARON R. PFENNIG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

The sole question presented by the Petition is whether a reviewing court is bound to defer to a regulation of the Federal Reserve Board interpreting the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, *et seq.*, when that regulation conflicts with an unambiguous provision of the statute.

Petitioners argue that the Sixth Circuit improperly substituted its interpretation of TILA's definition of a finance charge for that of the Federal Reserve Board. *See* Pet. at *i*. According to Petitioners, the Sixth Circuit misapplied this Court's holding in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), when it determined that an over-limit fee admittedly imposed incident to an additional extension of credit beyond the customer's original credit limit is a finance charge within the plain language of Section 1605(a) of the Act and must be disclosed as such. *See* Pet. at 10.

The Sixth Circuit's ruling creates no split in circuits on this issue and, in fact, tracks numerous decisions of this Court mandating that the unambiguous language of a statute controls over any conflicting regulation. Accordingly, there exists no justification for this Court to grant review.

I.

THERE IS NO CIRCUIT SPLIT

No other court of appeals has entertained the same question raised in the Petition. The Sixth Circuit is the first to address whether a fee imposed incident to granting a consumer an additional extension of credit to exceed his or her original credit limit constitutes a finance charge as that term is plainly defined in TILA.

Petitioners do not dispute that no other court of appeals has broached the same question at issue here. Instead, Petitioners suggest that the decision below generally conflicts with decisions of other courts of appeals on the question of deference. *See* Pet. at 10. According to Petitioners, "other courts of appeals, unlike the Sixth Circuit, have accorded a high degree of deference to the Federal Reserve's interpretations of TILA." *See* Pet. at 13. This argument simply is not supported by the language of the lower court decision.

In its decision, the Sixth Circuit specifically acknowledged and affirmed the same general, well-established principle referenced in each of the cases cited by Petitioners, *i.e.*, that the Federal Reserve Board is to be given considerable deference with respect to its interpretation of TILA. *See* Pet., App. at A5-A6 (citing *Milhollin*, *supra*, 444 U.S. at 568; *Begala v. Ohio, Nat'l Ass'n*, 163 F.3d 948, 950 (6th Cir. 1999)). Nothing in the decision below challenges or runs afoul of this principle.

Furthermore, none of the cases cited by Petitioners involves a statutory provision determined to be clear and unambiguous by the court of appeals, as is the case with the decision at issue here. As will be discussed at length below, this fact is dispositive. *See, e.g.*, *Chemical Manufacturers Ass'n v. NRDC*, 470 U.S. 116, 125 (1985) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n.9 (1984); *SEC v. Sloan*, 436 U.S. 103, 117-118 (1978)) ("if Congress has clearly expressed an intent contrary to that of the Agency, our duty is to enforce the will of Congress.").

Petitioners have failed to identify any split in the circuits on the question presented here. As such, accepting review of this case is unwarranted.

II.

THE COURT OF APPEALS DID NOT MISAPPLY THIS COURT'S HOLDING IN *MILHOLLIN*

The crux of the Petition is that the court of appeals allegedly misapplied this Court's holding in *Milhollin*. Even if that were accurate, it would provide no basis for review. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10.

Moreover, the decision below makes clear that the court of appeals was very mindful of the deference due the Federal Reserve's interpretation of TILA. The Sixth Circuit undertook a careful analysis of the *Milhollin* decision in deciding the case below. *See* Pet., App. at A5-A6. However, citing this Court's decision in *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981), the court of appeals acknowledged that "the FRB's authority is not without limits." *See* Pet., App. at A6. Indeed, this Court has held on numerous occasions that a reviewing court must not give credence to a regulation that contravenes the plain language or clear intent of a federal statute:

> If the statute is clear and unambiguous "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." . . . The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.

Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (quoting *Chevron*, *supra*, 467 U.S. at 842-843 (1984)).

See also Chemical Manufacturers Ass'n, *supra*, 470 U.S. at 125 ("Of course, if Congress has clearly expressed an intent contrary to that of the Agency, our duty is to enforce the will of Congress."); *Board of Governors, FRS v. Dimension Financial*, 474 U.S. 361, 368 (1986) ("no amount of agency expertise – however sound may be the result – " can change the plain meaning of the statute itself).

Therefore, the Sixth Circuit began its decision where this Court directed it should, *i.e.*, with the plain language of TILA. *See* Pet., App. at A9 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("It is rudimentary that 'the starting point for interpreting a statute is the language of the statute itself.'"). *See also Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute is its language[.]"). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Chevron*, *supra*, 467 U.S. at 291 (citing *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399, 403-405 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-221 (1986)). In doing so, "it is appropriate to assume that the ordinary meaning of the language that Congress employed accurately expresses the legislative purpose." *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985).

With this precedent in mind, the court of appeals held that there is no ambiguity in the particular statutory language at issue. *See* Pet., App. at A11. Specifically, TILA states that all charges "incident to the extension of credit" must be disclosed as part of the finance charge. *See* 15 U.S.C. § 1605(a). The common meaning of the phrase "incident to the extension of credit" is echoed by the Federal Reserve

Board's definition, which uses virtually identical language: "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor *as an incident to or a condition of the extension of credit* (emphasis added)." *See* 12 C.F.R. § 226.4(a).

Applying the plain language of the statute, the Sixth Circuit concluded that no regulatory interpretation of the phrase "incident to the extension of credit" was necessary: "the borrower has reached her credit limit, requests more credit, and the lender agreed to that extension of extra credit, but assesses a fee as a result. In such instance, the fee clearly is imposed incident to the extension of credit." *See* Pet., App. at A14 (citing 15 U.S.C. § 1605(a)). In coming to this conclusion, the Sixth Circuit was influenced by the fact that Petitioners never disputed the key fact. *Id.* at A10 ("Defendants fail to argue that the $29.00 fee was not imposed incident to the extension of credit"). Rather, they seek a rule of law that regardless of the plain language of the statute, a reviewing court must always defer to the regulation. Following the holding in *Kmart Corp.*, 486 U.S. at 291, the Sixth Circuit refused to impose such a standard. *Id.* at A10-A11.

Based on the plain language of the statute and Petitioners' failure to dispute its unambiguous application to the facts, the court of appeals determined that "the fee imposed in this case falls squarely within the statutory definition of a finance charge[.]" *See* Pet., App. at A9. This determination stays true to the substantial Supreme Court precedent on point. As such, there exists no justification for this Court to review the decision.

III.

REGULATION OF THE CREDIT CARD INDUSTRY IS NOT THREATENED BY THE DECISION BELOW

According to Petitioners, allowing the lower court decision to stand would create "regulatory and compliance problems for the Federal Reserve and the credit card industry because it creates conflicting disclosure obligations." Pet. at 17. This contention is overblown and fails for a number of reasons.

First, although suggesting that the decision will create one rule in the Sixth Circuit and another in the rest of the country, Petitioners fail to identify how requiring credit card issuers to comply with the plain language of TILA creates differing obligations from circuit to circuit. If a credit card issuer is conditioning an additional extension of credit on the imposition of a fee, that fee necessarily is "incident to the extension of credit" as that phrase is used in Section 1605(a). *See* Pet., App. At A9. Thus, regardless of the circuit in which the credit card issuer is doing business, TILA requires it to disclose that fee as part of the finance charge.

Similarly, the suggestion that some over-limit fees would have to be disclosed while others would not fails because disclosure of any particular fee as part of the finance charge rests on the application of the plain language of the statute, not the label arbitrarily assigned by the credit card issuer.

According to the Federal Reserve Board, the rule "excluding over-limit fees from the finance charge is based on the rational assumption that the fees are imposed when the consumer uses the credit plan in a manner that violates

the terms of the plan." *See* Pet., App. at A46. However, as the Sixth Circuit recognized, this case does not involve that situation:

> Plaintiff did not unilaterally exceed her credit limit. Rather, she requested additional credit in order to make purchases. Defendants could have declined her request. Instead, they granted it and then charged her a $29.00 fee for doing so. * * * Because Defendants knowingly allowed Plaintiff to exceed her credit limit and charged her a fee incident to this extension of credit, that fee is by definition a finance charge.

See Pet., App. at A13.

In this case, Petitioners are attempting to avoid disclosure of a true finance charge by calling it an "over-limit fee," so as to hide behind the protection of the Federal Reserve Board's regulation. Even the Federal Reserve Board concedes that when "a charge denominated as an over-limit fee is in fact an expected charge for extending credit itself[,]" that charge is actually "an anticipated cost of the credit extension and therefore a finance charge under § 226.4(a)." *See* Pet., App. at A50-A51 n.8.

Regardless of the label used to describe a specific fee, TILA undisputedly requires that if a charge is imposed "incident to the extension of credit," it must be disclosed as part of the finance charge. Nothing in the decision below changes that requirement.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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